FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 22, 2010

SECRETARY OF LABOR,	:	Docket Nos. WEVA 2006-853
MINE SAFETY AND HEALTH	:	A.C. No. 46-08791-090341-01
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2006-854
v.	:	A.C. No. 46-08791-090341-02
	:	
WOLF RUN MINING COMPANY	:	Docket No. WEVA 2007-666
	:	A.C. No. 46-08791-121866

BEFORE: Jordan, Chairman; Duffy, Young, and Nakamura, Commissioners[1]

DECISION

BY THE COMMISSION:

These consolidated civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"), involve five citations issued to Wolf Run Mining Company ("Wolf Run") for violations of 30 C.F.R. 75.521.[2] Judge

[1] Commissioner Robert F. Cohen, Jr., is recused in this case.

[2] Section 75.521 states:

> [1]Each ungrounded, exposed power conductor and each ungrounded, exposed telephone wire that leads underground shall be equipped with suitable lightning arresters of approved type within 100 feet of the point where the circuit enters the mine. [2]Lightning arresters shall be connected to a low resistance grounding medium on the surface which shall be separated from neutral grounds by a distance of no less than 25 feet.

30 C.F.R. § 75.521. The regulation as it pertains to power conductors originated as section 305(p) of the Federal Coal Mine Health and Safety Act of 1969 ("Coal Act"), and was carried over as the same section of the Mine Act, 30 U.S.C. § 865(p). The statutory language was promulgated as section 75.521 after the enactment of the Coal Act. 35 Fed. Reg. 17,890, 17,910 (1970). It was revised in 1973 to include ungrounded, exposed telephone wires. *See* 38 Fed. Reg. 4974, 4975

Jerold Feldman affirmed three citations that alleged violations of the standard but vacated two others. 31 FMSHRC 640, 666 (June 2009) (ALJ). He also concluded that the Secretary of Labor had established that one of the violations he affirmed was significant and substantial ("S&S"), but that she had failed to establish as S&S the other violation that the Department of Labor's Mine Safety and Health Administration ("MSHA") had designated as such.[3] *Id*. The Commission subsequently granted cross-petitions for discretionary review filed by Wolf Run and the Secretary challenging the judge's determinations.

I.

Factual and Procedural Background

In early January 2006, 12 miners died and one was seriously injured as a result of an explosion caused by lightning at Wolf Run's Sago Mine, an underground coal mine in Upshur County, West Virgina. 31 FMSHRC at 641, Jt. Ex. 2, at 2 (stipulations). MSHA's inspection of the mine as part of its subsequent accident investigation resulted in the agency issuing a total of 149 citations and orders to Wolf Run, including the five citations now before the Commission, though none were alleged to have contributed to the explosion. *See* Jt. Ex. 2, at 3, 5, 6, 7, 8, 9.[4]

MSHA's investigation included a complete inspection of all electrical equipment at the mine, which resulted in the issuance of many citations and orders to the operator. 31 FMSHRC at 641-42; Jt. Ex. 2, at 3. In these three dockets, Wolf Run contested 36 of the electrical citations and orders and their associated penalties. 31 FMSHRC at 640. The Secretary and Wolf Run settled 31 of the citations and orders, with the operator agreeing to pay $25,257 of the $28,339 that MSHA had initially proposed in penalties for those violations. *Id*. The judge approved the settlement as part of his decision. *Id*. at 640, 666-67. The remaining five citations, all alleging a violation of the requirements of section 75.521 regarding the use of lightning arresters, went to hearing.

By way of background, a lightning strike from as much as a mile away can cause a surge of energy on a power conductor. *Id*. at 645. Even when it does not hit the conductors directly, such a strike can induce thousands of volts and amps of electric current into a power conductor. Tr. 238-40.

(1973).

[3] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

[4] According to MSHA's investigation, the lightning ignited methane in an inactive portion of the mine. 31 FMSHRC at 641 & n.1; Jt. Ex. 2, at 3. This destroyed seals separating that area of the mine from its active portion, which permitted toxic levels of carbon monoxide to enter a portion of the active mine. 31 FMSHRC at 641 & n.1.

The purpose of a lightning arrester required by section 75.521 is to minimize the amount of such energy entering into the underground portions of the mine. 31 FMSHRC at 643.[5]

Unless a power conductor entering a mine from the outside is protected by a lightning arrester, the excess energy from a lightning strike on the conductor would not be dissipated into the ground, but could instead travel into the mine via the conductor. *Id*. at 645. This could energize the frames of equipment, resulting in a shock or electrocution hazard, and the energy could cause an arcing that would pose a fire hazard and an ignition source for methane. *Id*.

Four of the five citations at issue here involve the same type of allegation: a lightning arrester was required but not provided for a power conductor or communications wire that was located in whole or part aboveground on the surface at the Sago Mine, and either ran to, or originated in, an underground portion of the mine.[6] In Citation No. 7582485, MSHA charged that the lack of arresters on a 120-volt cable running from the fan house on the surface, through the track entry, to a water pump underground, constituted a non-S&S violation of the standard. Gov't Ex. 1, 11, 12, 14, 16. Citation Nos. 7583316 and 7583317, which were both designated S&S, each involved the lack of arresters on two 575-volt cables, both of which originated at a power center underground and powered separate battery cable chargers located on the surface. Gov't Ex. 2, 3, 13, 20, 21. Citation No. 7335233, also designated S&S, charged Wolf Run with violating the arrester requirement with respect to telephone paging and trolley phone system wires that ran from the Dispatcher's Office and entered the mine through the track entry. Gov't Ex. 5.

The fifth citation in this case, referred to herein as the "grounding medium citation," involves the second sentence of section 75.521, which states that "[l]ightning arresters shall be connected to a low resistance grounding medium on the surface which shall be separated from neutral grounds by a distance of no less than 25 feet." When an arrester directs overvoltage from lightning into the ground

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[5] The parties stipulated as follows regarding lightning arresters:

> A lightning arrester is a device that limits the overvoltage of lightning or other electrical surges by providing an electrical path between an ungrounded conductor and earth which is used as the grounding medium. A simple lightning arrester consists of two contacts that are separated by an air gap. One contact is connected to the transmission line and the other is connected to earth. The normal voltage of the circuit cannot bridge the gap. When an overvoltage occurs it sparks the gap between the contacts. This creates an electrical path for the excess energy to discharge to earth.

Jt. Ex. 1, at 3.

[6] Apparently it is rare for a mine to have equipment on the surface directly powered from an underground source, or underground equipment directly powered from a source on the surface. 31 FMSHRC at 659 n.4. Both types of situations occurred at the mine.

on the surface of the mine, an electrical field is created there, and serves as the grounding medium for that arrester. That area cannot be too close to the separate area serving as the neutral ground for a mine's underground electrical equipment,[7] otherwise electrical current from a lightning strike could travel along the neutral grounding medium to the underground equipment. To reduce the likelihood of such an event occurring, the second sentence of section 75.521 requires that the grounding medium for a lightning arrester must be at least 25 feet away from the neutral grounding medium for the underground equipment. Tr. 344, 398-400; Gov't Ex. 8 (MSHA Program Policy Manual ("PPM") excerpt for section 75.521 stating that "[t]his distance prevents lightning surges from being transmitted to the neutral field where they could momentarily energize the frames of equipment grounded to the neutral ground field").

The 25-foot distance was originally maintained at the Sago Mine, as there was a neutral resistance ground field located more than 25 feet away from the electrical substation at the mine. Tr. 333-35, 380; Jt. Ex. 1, at 2; Gov't Ex. 9. A ground wire ran to the field from the underground portion of the mine, first in a high-voltage shielded cable running from the power center to a pole outside the track portal and then as an overhead bare ground wire via another pole. Tr. 333-34, 339-40, 383-88.

The surface area around the substation was considered to be part of the grounding medium for the arresters in question in this instance because the arresters were connected to the substation. Tr. 325-26, 335, 340-46, 380-82, 397-98. Specifically, running from the substation, along a series of power poles, were three high voltage power lines and a "static wire" above the lines, which was there to provide "umbrella" type protection from lightning for those lines. Tr. 333-37, 348-49, 357, 364, 367-68, 374, 517-19; Gov't Ex. 9, 11, 23. Attached to one of the poles were a phone line ground wire, three transformers, and multiple lightning arresters for the power lines. Tr. 326-27, 347, 350, 355-56; Gov't Ex. 9, 23. The arresters and the static line had a common grounding to earth via a copper wire running down that pole, known as a "butt ground," designed to transfer the energy from any lightning strike down to the earth. Tr. 327, 331, 337-38, 347-48, 356, 358-59, 378-79, 535-36; Gov't Ex. 9, 23.

Intermingled with the high voltage lines was a cable that included a ground wire, and that cable powered the stacker belts, which were entirely above ground. Tr. 335-37, 359-60, 520-23; Gov't Ex. 9, 23. That ground wire was also attached to the butt ground. Tr. 335-37, 359-60, 369-73. The Secretary alleges in Citation No. 7583340 that the ground wire in the cable did not extend all the way to the stacker belts, but rather terminated early by connecting to the metal frame of the conveyor belt structure, thus resulting in the neutral ground becoming common with the lightning arrester ground, because that belt ran underground. Tr. 360, 366-67, 369-70, 375-77, 379-80, 398-99, 523-24, 540-43; Gov't Ex. 4, 9.

[7] The area designated to serve as the neutral ground for the underground equipment is a low resistance ground bed, which would serve to dissipate electricity from the frames of that equipment in the event of an electrical fault in the system. Tr. 383-84.

After the hearing, the judge found that for the four citations alleging the lack of one or more required lightning arresters, the Secretary's interpretation of the term "exposed" was reasonable and thus deserved deference. 31 FMSHRC at 656. He further concluded, however, that it was impossible to install a lightning arrester on a cable that is connected underground because it would defeat the 25-foot separation requirement required by the second sentence of the standard. *Id*. at 657. Consequently, he held that power conductors containing such cables are not subject to the provisions of section 75.521 because they are not "ungrounded," while "power cables, telephone wires and trolley wires that are not grounded are subject to section 75.521." *Id*. at 659.

Turning to the individual citations, the judge started by addressing the grounding medium citation, holding that it

> was issued because the lightning arrester ground for the overhead high voltage lines was connected to a ground wire for the power cable supplying the surface belts which in turn was connected to the conveyor belt frame on the surface. The problem arose because the underground portion of the conveyor frame was the medium used to connect the underground equipment to the neutral grounds. This condition clearly constitutes a violation of the 25 feet separation required in section 75.521. Citation No. 7583340 exemplifies why section 75.521 does not apply to power conductors in cables that are connected through the neutral ground medium.

Id. at 660. The judge also upheld the designation of the violation as S&S and the Secretary's proposed penalty of $963. *Id*. at 661-62.

As for the two citations alleging violations of the arrester requirement with respect to the battery charger cables (Citation Nos. 7583316 and 7583317), the judge vacated the citations. *Id*. at 649, 662. The judge found that the power center was grounded through the metal frame of the belt conveyor to the neutral ground field on the surface, and that, consequently, lightning arresters could not be used on the power conductors contained in the cables under the second sentence of section 75.521. *Id*. at 662. Accordingly he vacated the two citations, and thus did not reach the issue of whether the violations were S&S. *Id*.

With regard to the water pump cable (Citation No. 7582485), the judge found that the cable was not connected to the conveyor frame or otherwise connected to neutral grounds, and could not be considered grounded as its ground wire was conducting electricity. *Id*. at 663. The judge consequently found that the cable was subject to the lightning arrester provisions of section 75.521, upheld the citation, and assessed the $60 penalty requested by the Secretary. *Id*.

Finishing with the citation alleging the lack of lightning arresters on the communication wires (Citation No. 7335233), the judge held the grounding of one of the trolley wires at issue to the track at the track entry constituted adequate grounding for purposes of section 75.521, as the Secretary had conceded. *Id*. at 664. He also held that the grounding of the second trolley wire, at the far end of the track, after it ran along the roof, complied with section 75.521 as well. *Id*. Nevertheless, the judge

concluded that there was a violation of section 75.521 because neither of the two conductors in the cited telephone wires was grounded. *Id*. He refused to uphold the designation of the violation as S&S, however, because of his finding that any electrical surge from lightning would destroy the 12-volt telephone wires before the wires entered the mine portal. *Id*. Consequently, the judge did not assess the penalty at $440 as requested by the Secretary, but rather at $60. *Id*. at 663, 665.

II.

Disposition

Both parties filed petitions for discretionary review which the Commission granted. The Secretary seeks review of the following: (1) whether the judge erred in finding that section 75.521 did not apply to the cables supplying the battery chargers because of the ground wires within the cables and that to require the operator to ground the other conductors contained within the cable would result in a violation of the second sentence of the standard; and (2) whether the judge erred when he found that the violation of the standard posed by the telephone wires was not S&S.[8] Wolf Run's PDR challenges: (1) the judge's decision to the extent that it upheld the citations charging that the power conductors were subject to section 75.521 because they were "exposed" under the standard; (2) the judge's determination that the grounding medium violation had been established; and (3) the judge's conclusion that the grounding medium violation was an S&S violation.

A. The Grounding Medium Citation (No. 7583340)

We begin with the grounding medium violation, even though it involves the second sentence of section 75.521, because the judge employed his understanding of the basis for this citation in determining that two of the four other alleged violations, involving the lightning arrester requirement in the first sentence of the standard, could not be established.

1. Violation

Wolf Run argues that a violation of the second sentence of section 75.521 was not established and thus that the judge's finding should be reversed. WR Br. at 35-38. According to Wolf Run, the Secretary's witness acknowledged that the violation hinged on whether the ground wire among the power cables was attached to the belt structure, and the evidence does not establish that it was. *Id*. at 35-36. Wolf Run submits that the judge failed to resolve this key factual dispute and to address its arguments that, even if there was a solid connection between the ground wire and the belt frame, there was not necessarily a violation of section 75.521 in this instance. *Id*. at 36-38.

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[8] While the Secretary's petition for review included the question of whether the judge erred in concluding that the grounding of the trolley wire at the far end of the track constituted effective grounding for purposes of section 75.521 (S. PDR at 18-19), in her brief she withdrew her request for review of that issue. S. Br. at 4.

The Secretary agrees with Wolf Run that the judge erred by not resolving the factual dispute of whether the ground wire was connected to the structure, and thus urges the Commission to vacate and remand the finding of violation. S. Br. at 28-29. The Secretary further agrees that the judge failed to address Wolf Run's additional arguments, previously set forth in the operator's PDR, and states that on remand the judge should be instructed to do so. *Id*. at 29.

We agree with Wolf Run and the Secretary that the judge committed a fundamental error in concluding that there was a violation in this instance. Arthur Wooten, the MSHA inspector who issued the grounding medium citation, was the Secretary's primary witness at the hearing. Tr. 158-60, 325. He stated early in his testimony regarding the citation that, if the ground wire in the power cable had not been attached to the frame of the conveyor belt that led underground, no citation would have been issued. Tr. 341. He explained that the grounding field for the three arresters would have been the butt ground and the substation from which the cable originated, and thus the 25-foot distance requirement of section 75.521 would have been maintained. Tr. 380-81, 560-61, 570-71.

Throughout his testimony, Wooten referred to the ground wire in the power cable as having been attached not only to the butt ground wire (Tr. 335-37, 359-60, 369-73), but also to the conveyor belt structure, thus defeating the separation requirement. Tr. 360, 366-67, 369-70, 375-77, 379-80, 398-99, 523-25; Gov't Ex. 9, 23. However, Wolf Run's safety manager, John Semple, denied that the wire was attached to, and terminated at, the conveyor belt structure. Tr. 727. He instead described the wire as bypassing the conveyor belt and ultimately being attached to a control box for the surface stacker belts. Tr. 726-29, 761-65. Another member of the MSHA electrical inspection team, James Honaker, was called as a rebuttal witness to Semple. Tr. 828-31. Honaker confirmed Wooten's account and disputed part of Semple's, testifying that he had observed a solid connection between the ground wire at issue and the conveyor belt structure. Tr. 831-32.

The judge essentially accepted as true the citation as written (*see* 31 FMSHRC at 660), but at the hearing Wolf Run had clearly challenged the factual predicate of the citation. *See also* WR Post-Hearing Br. at 13 (one issue in matter was "[w]hether the ground wire for the cable conveying power to the surface conveyor equipment was attached to the underground conveyor structure").[9] Without resolution of the dispute over whether the ground wire was attached to the conveyor belt

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[9] Citation No. 7583340 states:

> The lightning arresters grounding medium was not separated from the neutral grounds by a distance of 25 feet. The arresters were wired in a manner that would not prevent the frames of the equipment being used underground which are connected to the neutral grounding field from becoming energized in the event of a strike on the surface. *The arrester ground was connected to the frames of the surface belt structure* which are entering the mine and are connected to the mine track and all underground electrical equipment.

Gov't Ex. 4 (emphasis added).

structure, it is impossible to determine whether the Secretary has established the condition that she alleges violated section 75.521 in this instance, and thus whether substantial evidence supports the judge's decision to affirm the grounding medium citation.[10] Resolving the dispute over whether the ground wire was so attached is primarily a matter of deciding which witness or witnesses to credit, and is thus within the province of the judge in the first instance.[11] Consequently, we vacate the judge's affirmance of the grounding medium citation and remand it for a resolution of whether the ground wire was attached to the belt structure. *See Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222-23 (June 1994) (remand appropriate when judge has failed to analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision).

Should he find that the ground wire was so attached, the judge on remand must then also address Wolf Run's remaining arguments as to whether the Secretary had established a violation of the second sentence of section 75.521. Wolf Run made these arguments in the brief that it submitted after the hearing (at 38-40), but the judge did not address them. It preserved these issues in its PDR (at 19-21) and its opening brief here (at 36-38). Consequently, the judge is required to address the arguments on remand. *See Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1941 (Nov. 1982) (instructing the judge on remand to address arguments he had, in error, failed to address originally).

2. S&S

Vacating the judge's decision affirming the citation means that the judge's finding upholding the violation as S&S is also vacated.[12] In addition to that ground for vacating and remanding the S&S finding, the parties again agree that there are other grounds on which to do so.

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[10] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means " 'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[11] Because the judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (*quoting Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

[12] In affirming that the violation was S&S, the judge found that, while lightning is unpredictable and random, it was dangerous to expose miners underground to the significant electrical surge that could result from a lightning strike on the high voltage lines. 31 FMSHRC at 661. The judge further found that this created both an electrocution hazard with respect to those miners in the vicinity of the underground equipment and an ignition source that could result in a fire or explosion. He concluded that the Sago tragedy demonstrated the serious hazard posed to miners by lightning. *Id*. at 661-62.

Wolf Run argues that the conclusion that a violation is S&S requires a finding that there was a reasonable likelihood that the hazard posed by a violation would result in an injury, and that therefore the judge applied the wrong legal standard for S&S when he stated that an electrical surge "could" result in a fire or explosion. WR Br. at 39-40 (quoting 31 FMSHRC at 661). The operator also takes issue with the judge's conclusion that the electricity from a lightning strike would have necessarily been conveyed underground, or even if it was, whether it would have been of sufficient voltage to be hazardous. *Id*. at 40-42.

The Secretary agrees that the judge misstated the legal standard for S&S in this instance, and that he should have determined whether the evidence was sufficient to establish that there was a reasonable likelihood that a lightning strike would result in an event causing injury. S. Br. at 30-31. The Secretary would have the Commission remand the case to the judge to apply the proper standard. *Id*. at 31. According to the Secretary, there is substantial record evidence to support an S&S finding under existing law. *Id*. at 31 n.18.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to "significant and substantial," i.e., more serious, violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard — that is, a measure of danger to safety — contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

Should the judge conclude on remand that a violation of section 75.521 was established, he will need to apply the *Mathies* factors to determine whether the violation was properly designated S&S. We note that in past cases we have not agreed that it is sufficient that a violation "could" result in an injury. *See Peabody Coal Co.*, 17 FMSHRC 26, 29 (Jan. 1995). Accordingly, on remand the judge should be more precise when discussing the potential for various injuries in the context of the *Mathies* analysis.

Moreover, the judge's decision does not reflect that he fully considered the evidence proffered by the parties and mentioned in their briefs regarding the likelihood of dangerous levels of electricity surging underground in the event of a lightning strike. *See* 31 FMSHRC at 661-62. His decision on

remand should reflect that he considered the specific evidence that the parties submitted on that key issue.

B. The Arrester Requirement Citations (Nos. 7583316, 7583317, 7582485, 7335233)

Only those power conductors that run in part underground and are both "exposed" and "ungrounded" on the surface are subject to the lightning arrester requirement contained in the first sentence of section 75.521. Therefore, to establish a violation, the Secretary had to prove that at least one conductor contained in the cable or wire at issue in a citation was both "exposed" and "ungrounded" as those terms are used in the standard. The judge held that the conductors were uniformly "exposed" for purposes of the regulation, but that only some of the conductors could be considered "ungrounded," and thus only those were subject to the arrester requirement. 31 FMSHRC at 655-59.

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citations omitted); *see also Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989) (citations omitted); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation . . . is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (other citations omitted)).

The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation[] and . . . serves a permissible regulatory function." *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citation omitted). The Commission's review, like the courts' review, involves an examination of whether the Secretary's interpretation is reasonable. *Energy West*, 40 F.3d at 463 (citing *Sec'y of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1439 (D.C. Cir. 1989)); *see also Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary's interpretation was reasonable).

1. Whether the Power Conductors Were "Exposed"

Below, the parties stipulated that, for each of the power cables cited, certain wires within the cables were the "power conductors" at issue, and that none of those wires were bare, as all were insulated and were contained within an outer protective jacket covering the cable. Jt. Ex. 2, at 5, 6-7, 7-8. The telephone wire and the trolley phone wires were also covered by insulation. *Id.* at 9. Wolf Run contended that this established that the conductors could not be considered "exposed" and thus the operator could not be found in violation of section 75.521 with regard to any of the four citations. WR Post Hearing Br. at 16-19.

The Secretary disputed that the presence of the insulation and outer jacket established that the conductors were not "exposed" under section 75.521. Inspector Wooten testified that the insulation simply serves to keep the electrical current confined within, thus protecting anyone who may come in contact with the live copper leads inside the wires from the hazard of electrical shock. Tr. 218-220. He further explained that the outer jacket was merely designed to provide mechanical protection for the inner leads and to prevent them from being damaged. Tr. 218. According to the Secretary's witnesses, neither the insulation nor the outer jacket protected the conductors from the atmospheric effects of lightning, and thus MSHA considered the conductors "exposed" under section 75.521. Tr. 218, 222-23, 276, 632.

At the hearing, the Secretary's witnesses also explained that, well prior to 2006, the PPM for section 75.521 provided a comprehensive illustration of the various ways in which a conductor could be protected from the effects of lightning, and thus not be considered "exposed" under the standard. Tr. 244-59. The PPM states that with regard to the first sentence of section 75.521:

> Conductors that are (1) provided with metallic shields; (2) jacketed by a ground metal covering or enclosure; (3) installed under grounded metal framework; (4) buried in the earth; or (5) made of triplex or quadraplex that is supported by a grounded messenger wire, *are considered for the length so protected*.

Gov't Ex. 8 (emphasis added). The parties stipulated that none of the conductors at issue in the four citations had the shielding referred to in the PPM (Jt. Ex. 2, at 5, 7, 8, 9), and it was established at the hearing that none of the cables or wires at issue met any of the four other qualifications. Tr. 258-59 (water pump cable), 289-91 (battery charger cables).

As it did below, Wolf Run maintains that the ordinary meaning of the term "exposed" is "bare," as in lacking insulation or otherwise uncovered, and that the conductors at issue in each of the four citations here were not bare. WR Br. at 9-19; WR Reply Br. at 8-10.[13] The Secretary responds that "exposed" is an ambiguous term and that her interpretation of it to mean "exposed to the effects of lightning" is a reasonable one, given that it is used in the context of a regulation designed to protect against the dangers of lightning. S. Br. at 20-25; S. Resp. Br. at 11-14.

To establish its asserted "ordinary" meaning of the term "exposed" in relation to conductors, Wolf Run relies upon *Merriam-Webster's Online Dictionary*, http://www.merriam-webster.com/dictionary/exposed (as accessed Oct. 13, 2008), which defines the term to mean "not

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[13] This argument is thus offered by Wolf Run as both as a basis on which it is appealing the judge's decision affirming the water pump cable and telephone wire citations, and as an alternative basis on which the Commission can uphold the judge's decision to vacate the battery charger cables citations, which the Secretary is challenging on appeal. As the party defending the judge's decision with respect to the battery charger cable citations, Wolf Run can argue in support of the judge's vacatur of those citations a basis for vacatur that the judge rejected – that the conductors cannot be considered "exposed" under the terms of section 75.521. *See Sec'y on behalf of Price & Vacha v. Jim Walter Res., Inc.*, 14 FMSHRC 1549, 1552 n.2 (Sept. 1992).

shielded or protected; *also*: not insulated <an *exposed* electric wires>." WR Br. at 10; WR Ex. 1. However, a number of other dictionary definitions of "exposed" support the Secretary's interpretation of the term to mean "subject to the atmospheric effects of lightning."[14] Under those definitions, to "expose" a conductor can mean to put it in a position in which it is subject to the effects of lightning.

Where dictionary definitions must be relied upon to establish the meaning of a term, and those definitions show that a term as it is used in a regulation is open to alternative interpretations, the Commission has found the term to be ambiguous. *See Island Creek Coal Co.*, 20 FMSHRC 14, 19 (Jan. 1998). Consequently, while the term "exposed" can be used to describe a wire that is not insulated or otherwise not covered, that is by no means the only meaning of the term.

Moreover, we ascertain the meaning of regulations not in isolation, but rather in the context in which those regulations appear. *RAG Shoshone Coal Corp.*, 26 FMSHRC 75, 80 & n.7 (Feb. 2004). As the Secretary points out (S. Br. at 22), MSHA's Part 75 electrical regulations demonstrate that when the agency refers to uninsulated wires, it uses the term "bare." *See* 30 C.F.R. §§ 75.516 ("bare or insulated ground or return wires"), 75.517 ("bare signal wires"). Accordingly, if MSHA had meant to limit the scope of section 75.521 to uninsulated wires, it would have made more sense to use the term "bare" than the term "exposed."

Further, the terms of section 75.521 must be read in the context of a regulation clearly designed with protection from the effects of lightning in mind. Consequently, interpreting the term "exposed" as referring to those effects makes much more sense than the interpretation offered by Wolf Run. We thus agree with the judge's reasoning upholding the Secretary's interpretation of the term:

> section 75.521 seeks to mitigate, by means of lightning arresters, the hazard posed by the high[-]powered transmission of electrical energy from a lightning strike from the surface to the underground mine. Thus, the focus of the cited standard is on power cables that are situated on the earth's surface and "exposed" to lightning. It naturally follows that the term "exposed conductors" refers to the location outside the underground mine, rather than their method of insulation and protection from human contact.

31 FMSHRC at 656.[15]

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[14] For instance, one definition of "expose" is "to lay open (as to attack, danger, trial, or test): make accessible to something that may prove detrimental: deprive of shelter, protection, or care." *See Webster's Third New Int'l Dictionary Unabridged* 802 (1993). Another dictionary defines "expose" to mean "to lay open to something specified." *See The Random House Dictionary of the English Language Unabridged* 682 (2d ed. 1987).

[15] We also agree with the judge that this case can be decided without relying on the PPM. *Id*. at 655-56. The purpose of the PPM is to explain to operators the different methods they can

Finally, and perhaps most importantly, the meaning of "exposed" in section 75.521 is best understood by the equivalent regulation that applies to underground metal and nonmetal mines. Using more precise language, that regulation states:

> Each ungrounded conductor or telephone wire that leads underground and is *directly exposed to lightning* shall be equipped with suitable lightning arrester of approved type within 100 feet of the point where the circuit enters the mine. Lightning arresters shall be connected to a low resistance grounding medium on the surface and shall be separated from neutral grounds by a distance of not less than 25 feet.

30 C.F.R. § 57.12069 (emphasis added). There is no logical reason why underground coal mines would be subject to a regulation designed to be less protective with regard to the effects of lightning than the regulation governing other mines, and it would make little sense for MSHA or its predecessor agency to have intended such a result. Consequently, we uphold the Secretary's interpretation of the term "exposed" as eminently reasonable in this instance.

Wolf Run argues that even if we accept the Secretary's interpretation of the term "exposed," there remains the issue of whether the operator had been provided adequate notice of that interpretation. WR Br. at 19-21. Separate from the issue of regulatory interpretation is whether the regulated party has received fair notice of the Secretary's interpretation of the regulation. Where the imposition of a civil penalty is at issue, considerations of due process prevent the adoption of an agency's interpretation "from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) (citations omitted). An agency's interpretation may be permissible but nevertheless may fail to provide the notice required to support imposition of a civil penalty. *See Gen. Elec*, 53 F.3d at 1333-34; *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982).

The Commission's test for notice under the Mine Act is "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). In deciding whether a party had adequate notice of regulatory requirements, a wide variety of factors is relevant, including the text of a regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with ascertainable certainty of its interpretation of the standard in question. *Lodestar Energy, Inc.*, 24 FMSHRC 689, 694-95 (July 2002); *see Island Creek.*, 20 FMSHRC at 24-25; *Morton Int'l, Inc.*, 18 FMSHRC 533, 539 (Apr. 1996); *see also Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976); *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997).

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employ under the regulation to protect power conductors from "exposure," and the citations in this instance would have been justified even in the absence of the PPM.

As discussed, the Secretary's interpretation is practically a self-evident one, given the context of the regulation. In addition, the PPM clearly indicates that "exposed" was being used in section 75.521 in the context of protection from the effects of lightning. Finally, as the Secretary points out in her brief, there is record evidence from Wolf Run's own witness that it attached lightning arresters to insulated cables running from the surface to underground locations. S. Br. at 24-25 (citing Tr. 823). We therefore conclude that Wolf Run had adequate notice of the Secretary's interpretation of the term "exposed" as it appears in section 75.521.

2. Whether the Power Conductors Were "Ungrounded"

The Secretary argues that, in vacating the two battery charger cable citations, the judge failed to properly understand the concept of grounding as it is used in section 75.521. She submits that the judge confused the concept of the grounding of a "conductor" with the grounding of the cable or wire in which it is contained. S. Br. at 14-15, 16-19; S. Resp. Br. at 2-5, 7-11. The Secretary further contends that the judge also erred in concluding that connecting a lightning arrester to a cable that was connected to a power source underground would necessarily result in a violation of the 25-foot separation requirement set forth later in the standard. S. Br. at 15-16; S. Resp. Br. at 5-7. Wolf Run's position is that the judge had numerous grounds to reject the Secretary's arguments that the battery charger cables should be considered ungrounded for purposes of section 75.521. WR Br. at 24-31, WR Reply Br. at 1-8.[16]

The judge found that the cables that originated underground from the underground power source and ran to the surface to the battery chargers were connected to the neutral grounding medium. He further concluded that if Wolf Run had installed lightning arresters on those cables, as MSHA alleges that it should have, the operator would have violated the 25-foot separation requirement with respect to the grounding fields. 31 FMSHRC at 657-59.

Because the judge concluded that it would have thus been impossible for the operator to comply with both sentences of section 75.521 in this instance, he vacated the two battery cable charger citations, as they were connected to the underground power center. *Id*. at 662.[17] In so doing, the judge misapprehended the record evidence with respect to this issue. Consequently, substantial evidence in the record does not support the judge with respect to this basis for his vacatur of the two battery charger cable citations.

The judge apparently concluded that installing an arrester on any cable that ran to the underground power center would result in the same violation of the second sentence of section 75.521 that is alleged in the grounding medium citation. With regard to the grounding medium citation, however, as discussed *supra*, slip op. at [4-5, 7], the record establishes that the butt ground wire connected the arresters *and* a grounding wire that ran to the belt conveyor (which, if connected to that structure, defeated the 25-foot separation requirement). Tr. 335-37, 359-60, 369-73.

With regard to all the cables or wires at issue in the four arrester requirement citations, the arresters would only have been installed on the ungrounded *conductors* within the cables or wires, as they carried current to the equipment. Tr. 199-201, 206-07, 276-77, 844, 861. The arresters would not have been connected to any ground wires in the cables, because such wires do not normally carry

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[16] The judge found that neither the water pump cable nor the telephone wires were grounded, which led him to affirm the citations. 32 FMSHRC at 663, 664. Wolf Run did not appeal those findings.

[17] The judge also noted this issue when discussing the water pump cable citation, but found that the cable was not connected to the neutral ground medium. *Id*. at 663.

such current. Tr. 201-02, 207, 842, 844, 860-61. The lack of a connection between a ground wire and an arrester thus makes the two situations quite different. Consequently, the judge erred in concluding that it would have been impossible to comply with the first sentence of section 75.521 with respect to the two battery charger cables without violating the second sentence of the standard.[18]

The judge also considered the issue of grounding in the context of whether the cables or telephone wires at issue contained a properly functioning ground wire. In the judge's view, if such a ground wire were present, as was the case with the battery charger cables, the cable would not be considered "ungrounded" under section 75.521. 31 FMSHRC at 658-59. Conversely, the judge held that those power conductors that were within cables that did not include a properly functioning ground wire were "ungrounded," so he affirmed the water pump cable and telephone wire citations. *Id*. at 659.

We agree with the Secretary that the judge erred in focusing on whether the cables at issue contained a ground wire. Section 75.521 plainly states that it is directed at ungrounded "*conductors*," and not the cables which contain the conductors. *Compare* 30 C.F.R. §§ 75.516-2, 75.517, 75.517-1, 75.517-2 (nearby regulations regulating the use of "cables"). Moreover, throughout the hearing, the Secretary was clear that the violation occurred in each instance to the extent that one or more wires, contained in the cable or wire that was the subject of the citation, were serving as a "power conductor." Tr. 199-201 (two phase conductors in water pump cable); 212-13 (improperly connected ground wire in water pump cable), 276 (three phase conductors in each battery charger cable), 621-22 (trolley wires), 622-24 (telephone wires). Indeed, the parties' stipulations contain multiple references to one of the issues being whether "conductors" were ungrounded. Jt. Ex. 2, at 4, ¶¶ 13, 15. Thus, even if a proper functioning ground wire was present in a cable, the proper inquiry was whether any of the power conductors contained in the cable was itself "ungrounded."

As to the term "ungrounded," we agree with the judge that the term is ambiguous as it applies to "conductors." There is no applicable regulatory definition of the term, and while Subpart H of Part 75 governs grounding (*see* 30 C.F. R. § 75.700 et seq.), it does not address the grounding of "conductors."

The only reason the judge gave for holding that the Secretary unreasonably interpreted "ungrounded" in applying it to conductors in cables containing a properly functioning ground wire is the definition of "grounded power conductor" contained in the *Dictionary of Mining, Minerals, and Related Terms* (2d ed. 1997) ("*DMMRT*"). *See* 31 FMSHRC at 658. There a "grounded power conductor" is defined as "[a]n insulated or bare cable that constitutes one side of a power circuit and

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[18] We note that Wolf Run did not argue to the judge that complying with the arrester requirement for cables powered from underground would result in a violation of the second sentence of section 75.521; the judge apparently arrived at that conclusion on his own. *See* S. Br. at 15. On review, Wolf Run argues in defense of the judge's opinion that the proximity within a cable of the ground wire to the conductors supports the judge's conclusion, but cites no record evidence in support of this view. *See* WR Br. at 28-29; WR Reply Br. at 4-5.

normally is connected to ground. It differs from a ground wire in that a grounded power conductor normally carries the load current while the equipment it serves is in service." *DMMRT* at 247.

The Secretary objects to the judge's consideration of this definition because it was not included in the record, and the Secretary did not have an opportunity to address it during the hearing. S. Br. at 16-17. While this is true, we do not hold that the judge necessarily erred in looking to the *DMMRT* definition. The technical usage of a term is quite relevant in determining its meaning,[19] and the *DMMRT* is a recognized authority for such usage.

However, we cannot hold that the *DMMRT* definition in question is dispositive in this instance. The definition essentially treats a "conductor" as the equivalent of a "cable," but in this case the cables at issue were composed of multiple conductors, some of which connected to ground and thus did not power the equipment, but others of which were not connected to ground and carried current to the equipment. Tr. 200-04; Gov't Ex. 16. Consequently the judge, in deciding whether the Secretary's interpretation was reasonable, should have considered more than the *DMMRT* definition.

As with the entire standard, there is no regulatory history that could assist in understanding section 75.521's use of the term "ungrounded" as it applies to conductors. Consequently, we look to the explanation provided at hearing by the Secretary's witnesses as to why the conductors themselves would have had to be grounded to not fall within the scope of the regulation, and why it was not sufficient that they were contained in a cable that contained a ground wire.

The Secretary's witnesses explained that to escape the purview of the arrester requirement of section 75.521, the conductors themselves must be grounded, given the amount of electricity that could surge through them in the event of a lightning strike. The ground wire in a cable is designed merely to protect against a fault, short circuit, or damage to the cable. Because of the considerably greater danger posed by the energy from lightning, in the absence of lightning arresters MSHA would require any exposed conductor to be grounded to direct that energy to the earth, where it will dissipate. Tr. 276-79, 284, 873-74.

As the Secretary notes, Wolf Run's witnesses did not contradict her witnesses on this issue. S. Br. at 15. Rather, Wolf Run has argued that the Secretary's evidence establishes that the grounding of a conductor prevents electricity from flowing to the equipment it serves, and that therefore the Secretary's interpretation of the standard is not entitled to deference because it would lead to the absurd result of preventing a power conductor from serving its intended purpose. WR Br. at 25.

Wolf Run correctly characterizes the testimony, as MSHA electrical engineer Honaker testified that a grounded conductor will not provide power to the equipment to which it is connected.

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[19] If there is no regulatory definition of a term, the Commission will look to its technical usage. *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (table), 1997 WL 159436 (D.C. Cir. 1997).

Tr. 861, 873. However, this does not establish that the Secretary's interpretation of "ungrounded" is absurd in this instance. Honaker stated that it is rare to have an underground source for surface equipment and vice-versa (Tr. 862), so section 75.521 is rarely applicable. Moreover, he attempted to explain that, at the time the standard originated, it was common at small mines for there to be direct current ("DC") electrical systems which had grounded conductors, but references to the "grounding" of a conductor now make less sense with the predominance of alternating current ("AC") systems throughout mining. Tr. 848-50.

Thus, it is true that time has likely rendered the standard's reference to "ungrounded" with respect to conductors superfluous, as Wolf Run argues. WR Br. at 26; WR Reply Br. at 7. However, the obsolescence of a single term in the standard does not make continued application of the entire standard "absurd." The lightning arrester requirement only applies to ungrounded conductors that are "exposed." Accordingly, while it may be impossible for a conductor to provide power while grounded, and thus an operator cannot ground a conductor to avoid the arrester requirement, an operator has control over the design of its mine's electrical system, and can still avoid the arrester requirement as to that conductor by not having an "exposed" power conductor running between the surface and underground.

In light of the foregoing, we cannot agree with the judge that the Secretary's interpretation of "ungrounded conductor" to include the conductors at issue here is unreasonable and thus not deserving of deference. Accordingly, we vacate the judge's determination that section 75.521 was not violated as alleged in the two battery charger cable citations.

On remand, the judge needs to decide one or more additional issues with respect to the battery charger cable citations which he did not reach because he vacated the citations: (1) whether Wolf Run had adequate notice regarding the Secretary's interpretation of the term "ungrounded" as it applies to a power conductor contained in a cable that has a properly functioning ground wire (s*ee* S. Post-Hearing Br. at 39-41; WR Post-Hearing Br. at 36-37);[20] and if Wolf Run had such notice, (2) whether it was established that the two violations of section 75.521 were S&S, as alleged in the citations, and (3) the penalties for the citations.

3. The Telephone Wire Non-S&S Finding

The telephone and trolley wires citation was designated by MSHA as S&S as to the violation of section 75.521 posed by the two-conductor telephone wire, and not the trolley wires. The judge, however, concluded that the energy from a lightning strike would be unlikely to enter the mine via the telephone wires, because the wires have a relative low voltage capacity of 12 volts. 31 FMSHRC at 664. Because the surge from a lightning strike can exceed one million volts, the judge reasoned

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[20] Because Chairman Jordan believes that a reasonably prudent person familiar with the mining industry and the protective purpose of lightning arresters would have recognized that the presence of a ground wire in a cable does not comply with the requirement in section 75.521 that an exposed power conductor in such a cable must itself be grounded, she does not join in including the issue of notice in the remand.

that the telephone wire likely would be destroyed by such a surge before the energy entered the mine. *Id*. Consequently, the judge modified the citation to delete the S&S designation. *Id*. at 664-65.

The Secretary urges the Commission to reinstate the S&S designation and remand the case for a recalculation of the penalty on the ground that the judge confused the figure cited for the normal voltage *carried* by the telephone wire – 12 volts – with the wire's *capacity* to conduct electricity. S. Br. at 26-27. The Secretary also argues that the judge erred in assuming that electricity from a lightning strike would not be conducted into the mine via the wires before the wires were destroyed. *Id*. at 27.

Consistent with the position it takes with respect to whether the battery charger cable citations could properly be found to be S&S (WR Br. at 42), Wolf Run argues that there are too many variables to predict what would happen in the event any of the cables or wires at issue in this case were affected by a lightning strike. WR Br. at 43-45; WR Reply Br. at 11. Wolf Run maintains that in the case of the telephone wires, there is a lack of evidence to support an S&S finding. WR Br. at 45-46; WR Reply Br. at 11.

We agree with the Secretary that the judge's conclusion regarding the capacity of the telephone wire is not supported by substantial evidence, in that MSHA Engineer Kevin Hedrick only testified regarding the voltage *normally carried* by Wolf Run's telephone wires, and did not discuss the *capacity* of such wires. Tr. 622, 624, 644. We also agree with the Secretary that it was error for the judge to fail even to acknowledge Hedrick's statement that a surge of electrical energy from lightning could enter a mine via the wire before that energy destroyed the wire. Tr. 654. While Wolf Run makes a number of possibly valid points regarding the quality of the Secretary's evidence on the S&S issue, this is an issue that is best decided by the judge on remand. Consequently, we vacate and remand the judge's non-S&S finding for his consideration of the overall record with regard to whether the violation of section 75.521 was S&S in this instance.

III.

Conclusion

For the foregoing reasons, we (1) vacate and remand the judge's determination that an S&S violation of section 75.521 was established with regard to the grounding medium (Citation No. 7583304); (2) reverse the judge's determinations that violations of section 75.521 were not established with respect to the two battery charger cables (Citation Nos. 7583316 and 7583317), and remand for a determination whether the operator had adequate notice of the term "ungrounded" with respect to those cables, and, if there was such notice, the further determinations of whether the violations were S&S and the appropriate penalties for the violations; (3) affirm in result the judge's determination that a violation of section 75.521 was established with respect to the water pump cable (Citation No. 7582485); and (4) affirm in result the judge's determination that a violation of section 75.521 was established with respect to the telephone wire (Citation No. 7335233), and vacate and remand the judge's finding that the violation was not S&S.

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